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IN THE SUPREME COURT

of the

UNITED STATES

1450

October Term, 1970

No._____

JAMES B. POLSON,
Petitioner

v.

STATE OF IDAHO
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS L. SMITH
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Boise, Idaho 83701

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CITATIONS

UNITED STATES CONSTITUTION:

Article 1, Section 10
Amendment 5
Amendment 8
Amendment 13
Amendment 14

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES:

19-2514

JURISDICTION

Jurisdiction is invoked in this cause pursuant to 28 USC 1257, for the review of a state supreme court decision and also because this case involves the application of a recidivism statute in violation of the double jeopardy and due process of law provisions of Amendment 5 and 14 to the United States Constitution, of Article 10 of the Constitution prohibiting the enactment of ex post facto laws, of Amendment 8 to the Constitution prohibiting cruel and unusual punishment, and of Amendment 13 to the Constitution prohibiting involuntary servitude except as punishment for a crime.

QUESTIONS PRESENTED

1. Is the Idaho recidivist statute as applied to this petitioner violative of the provisions of the United States Constitution forbidding

(a) ex post facto laws

(b) double jeopardy

(c) cruel and unusual punishment

(d) denial of due process and equal protection of the law

(e) involuntary servitude.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

l statutory provi-

The following constitutional and a:
sions are set forth in Appendix A, infr
ON:

UNITED STATES CONSTITUTI(

Article 1, Section 10

Amendment 5

Amendment 8

Amendment 14

Amendment 13

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES

19-2514

STATEMENT

Petitioner was arrested upon a charge of assault with a deadly weapon with intent to mu rder, under Idaho Code Section 18-4015, follcwing a shoc ing incident in Idaho Falls, Idaho, on May 2, 1966. The p titioner and one Carl Holm, a longstanding acquaintance, w re both in possession of pistols and exchanged shots wi h each other in a bar on said date; the petitioner was w unded, but Holm was not.

Following trial and conviction upon said charge,

the petitioner was also tried for being a persistent violator of the law under Idaho's recidivism statute, Section 19-2514, Idaho Code.

Petitioner was sentenced to serve the maximum penalty of 14 years imprisonment upon the assault charge, and to an additional 10 years on the conviction of recidivism.

Upon appeal to the Idaho Supreme Court, the conviction of assault with a deadly weapon with intent to murder was affirmed and the conviction for being a persistent violator of the law was reversed and remanded for a new trial. 92 Ida. 615, 448 P. 2d 229 (1968). Cert den. 395 U. S. 977. (1969)

Following remand for a new trial, the petitioner was tried and convicted on August 25, 1969, of the charge of being a persistent violator of the law under Idaho Code 19-2514. (There is no reported decision of the trial Court). Appeal was taken from this conviction to the Idaho Supreme Court, which Court affirmed the judgment of conviction. See State vs. Polson #10558, _____ Ida. _____, 478 P. 2d 292 (Dec. 4, 1970) pet. REH. Den. Jan. 7, 1971. (page 15 herein)

REASONS FOR GRANTING WRIT

Writ of certiorari should be granted to review the matters raised as follows, under the subheadings

of Ex post facto, Double Jeopardy, Cruel and Unusual Punishment ,, Due Process and Equal Protection of the Laws, and Involuntary Servitude.

(A) Ex post facto.

Article 1, Section 10, of the United States Constitution provides inter alia that "no state shall* * * pass any* * * ex post facto law, * * * " An ex post facto law has been defined as one that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

Calder v. Bull, 3 Dall. (US), 1 L ed 648.

Applying these rules to the case at hand, we would argue that petitioner, when charged with violating Idaho Code Section 19-2514, the recidivism statute, was subjected to an ex post facto law, for that law imposes a greater punishment for criminal conduct, upon third conviction, regardless of the crime (as long as it is a felony than would or could be imposed for the prior offenses. The various offenses are not punishable in increasing degrees based upon number of occurrence, except for the recidivism statute. The same man may commit the same crime three times, and twice for his conduct receive the maximum penalty or sentence allowed by law. But upon the third conviction he may be punished to a

greater degree than before, under the recidivism statute NOT because of his present act or conduct, but because of his two previous convictions; in other words he is punished greater today for an act committed today than he could have been punished yesterday, because of an act he committed yesterday.

It is not logical nor realistic to say that the application of the recidivism provision is not an ex post facto situation.

(B) Double Jeopardy.

Amendment 5 to the United States Constitution provides in part that "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

This provision protects an accused against peril of a second punishment for the same criminal conduct.

See Rupert v. State, 9 Okla. Cr. 226, 131 Pac. 713.

It is submitted that application of the recidivist statute of Idaho, Section 19-2514, Idaho Code, in this case amounts to double jeopardy. Petitioner has been convicted of three felonies, sentenced therefor, and served his debt to society for said acts. To assess additional punishment, based upon prior conduct for

which the petitioner has been punished, again, in both reason and logic, can amount to nothing more than double punishment, in contravention of Amendment 5 of the Constitution of the United States.

(C) Cruel and Unusual Punishment.

Amendment 8 of the Constitution of the United States states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis supplied)

Idaho's various criminal statutes provide for the maximum fine and punishment for violation thereof. These punishments are the usual punishments for breach of the statutes. Application of the recidivist statute to a third felony which would otherwise be punished in the usual manner applicable to the prior two felonies, would be unusual or not usual punishment and would be in contravention of the provisions of Amendment 8 of the Constitution. To say otherwise would be closing our eyes to reality.

(D) Due Process and Equal Protection.

Amendment 14 to the Constitution of the United States places the following restriction upon the various states:

> "nor shall any state deprive any person of life, limb, or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The terms "due process" and "equal protection of the laws" encompass a fundamental principle of justice circumscribing the power of the government with a substantive control, guaranteeing to the individual that he shall be treated in no different manner than other individuals and that his treatment shall be according to established rules and procedure. The problem that we face with recidivist statutes such as exist in Idaho, is that the accused is treated differently than others; is subject to greater sanctions and punishments than are normally applied to first or second offenders; and is placed in the position of being discriminated against, depending on the whim of the prosecutor, who has the sole, omnipotent choice of who shall be selected to be charged under the statute.

(E) Involuntary Servitude.

Amendment 13 to the Constitution of the United States provides that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

There are authorities on both sides of the question of whether recidivist statutes are a crime, or whether

they are merely a status which entitles a court to assess additional punishment. Most cases follow the latter approach. Typical of this is the statement of the Seventh Circuit Court of Appeals in the case of U.S. v. Dowd, 271 F 2d 292, wherein it is stated at page 295 of the Federal Report:

> "The state or condition of being a habitual criminal is not a crime but it is a status or circumstance which affords a proper basis for classifying such individual as one subject to greater of additional punishment than would otherwise be imposed upon conviction of a subsequent offense."

As argument, we urge the position of Judge Parkinson, who dissented in the Dowd case. The 13th Amendment does not read "punishment incidental to crime", nor " punishment for criminal conduct by commission of repetitive felonies for which the full statutory punishment has been inflicted." It clearly and succinctly states "as a punishment for crime"

It is submitted that punishment for a status, not for a crime, clearly violates the 13th Amendment.

CONCLUSION

It is respecfully presented herein that this court should accept certiorari in this matter by issuance of its writ, to review the constitutional issues raised herein.

WHEREFORE, petitioner prays for issuance of

a writ of certiorari.

Dated this 31st day of March, ~~1969~~ 1971.

Respectully submitted,

DERR, DERR & WALTERS

By ALLEN R. DERR
Allen R. Derr, Of the Firm
817 W. Franklin Street
Boise, Idaho 83702

I herein certify that on March 5 1971, I served a true and correct copy of the foregoing Petition for Writ of Certiorari by mail, postage prepaid, on the Attorney General of the State of Idaho and the Prosecuting Attorney of Bonneville County, State of Idaho.

ALLEN R. DERR
Allen R. Derr

APPENDIX A

United States Constitution, Article 1, Section 10:

"(1) No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,

or grant any title of nobility.

"(2) No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection law; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to revision and control of the congress.

"(3) No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or such imminent danger as will not admit of delay."

United States Constitution, Amendment 5:

"(CRIMINAL ACTION--PROVISIONS CONCERNING--DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.) --No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 8:

"(BAIL--PUNISHMENT)--Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14:

"Section 1. (CITIZENSHIP--DUE PROCESS OF LAW--EQUAL PROTECTION.)--All persons born or naturalized in the United States , and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. (REPRESENTATIVES--POWER TO REDUCE APPORTIONMENT,) --Representative shall [illegible] their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridge, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one of age in such state.

"Section 3. (DISQUALIFICATION TO HOLD OFFICE.)--No person shall be a senator or representative in congress, or elector of President and Vice-Pres-

ident, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the Unites States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

"Section 4. (PUBLIC DEBT NOT TO BE QUESTIONED--DEBTS OF CONFEDERACY AND CLAIMS NOT TO BE PAID.)--The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. (POWER TO ENFORCE AMENDMENT.)--The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

United States Constitution, Amendment 13:

"Section 1, (SLAVERY PROHIBITED.) -- Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. (POWER TO ENFORCE ARTICLE.) --Congress shall have power to enforce this article by

appropiate legislation."

United States Statute, 28-1257:

"STATE COURTS; APPEAL; CERTIORARI. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(l) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being trepugnant to the Constitution, treties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right , privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Idaho Statute, 19-2514:

"PERSISTENT VIOLATOR--SENTENCE ON THIRD CONVICTION FOR FELONY.--Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to imprisonment in the state penitentiary for not less than five years and said imprisonment may extend to life."

APPENDIX B

IN THE SUPREME COURT OF THE S

No. 10558 ATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent,
v.
JAMES B. POLSON, Defendant-Appellant.

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Filed: o, September Term
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Vollmer, Acting
Clerk.

Appeal from the District Co
Judicial District of the State of Idaho
The Honorable Boyd R. Thomas, Di of the Seventh
Second trial and judgment of Bonneville County.
a persistent violator of the law purs rict Judge.
a persistent violator of the law p
from this Court. Affirmed.
viction of being
to a remand

Derr, Derr & Walters, Boi
Robert M. Robson, Attorney G
Idaho,
Martin R. Ward, Assistant At
State of Idaho, Boise, and Se
ecuting Attorney, Idaho Falls
oise, for Appellant
ey General, State of
t Attorney General,
d Seward French, Pros-
alls, for Respondent.

SHEPARD, J.

Defendant-appellant Polson wa
was charged and con-
victed of the crime of assault with int
intent to commit mur-
der and of being a persistent violator
tor of the law. The

judgment of conviction was appealed to this Court, which affirmed the conviction of assault with intent to commit murder, but reversed the conviction of being a persistent violator of the law. The cause was remanded to the trial court for a new trial upon that charge alone. State v. Polson, 92 Idaho 615, 448 P. 2d 229 (1969). Upon remand, a jury trial was held on the persistent violator charge and the defendant was convicted by jury verdict. Following such conviction this appeal was taken.

Appellant assigns error to the procedure of the trial court in holding a new trial on the recidivism question alone rather than trying the recidivism question before the same jury that heard the trial resulting in the conviction of assault with intent to commit murder. The record reveals that no objection was made to the impaneling of the jury on such ground. It is further obvious that upon the remand of this case the previous appeal, the District Court had no alternative but hold a separate trial on the recidivism question. Appellant argues that State v. Johnson, 86 Idaho 51, 383 P. 2d 326 (1963) and the doctrine established therein was violated by the procedure at the trial court upon remand. Johnson only held that error had been committed in placing before the jury the fact of the recidivism charge and prior convictions during the trial of the third felony charge. The Court's reasoning in that case was that

the defendart should be insulated from the prejudicial effect of exposing a jury to a defendant's past criminal record prior to their determination of his guilt or innocence upon the third felony charge. In the procedure in the case at bar the defendant was assured just such insulation.

Appellant next assigns error in the alleged failure of the trial court to require the state to prove beyond a reasonable doubt a third conviction of a felony and rather, that the court instructed the jury concerning the third felony conviction. We find no merit in appellant's contention, since the trial court could take judicial notice of its records showing the judgment of conviction.

Appellant assigns as error the admission of certain evidence. He contends that certain exhibits contained erasures and changes. Such documents were judicial records offered by the state to prove Polson's prior convictions. Said exhibits were identified and certified to by the clerk of the court who was on the stand at the time the exhibits were tendered for admission. Where a public record is produced by an officer, who by law is entrusted with the custody of such record, the party offering it in evidence is not required to explain mutilations or deletions appearing on the document. Crossen v. Oliver, 61 P. 885 (Ore. 1900). Here an opportunity existed to cross-examine the person tendering said document regarding the erasures and changes appearing

thereon. Further, appellant has shown no prejudice therein. Appellant further contends that the judicial record offered to prove another prior conviction was improperly admitted in evidence, since the certification thereon was made by a former clerk of the District Court for Twin Falls County who was not in office at the time the document was offered in evidence. The admissibility of such a document in evidence is not disturbed by lapse of time or by the passing out of office of the certifying officer and the appointment of a new custodian. State v. Dawe, 31 Idaho 796, 177 P. 393 (1918).

Appellant assigns error in the admission into evidence of certain fingerprint cards, one of which was identified by an Idaho Falls police officer as a part of the permanent records of the Idaho Falls Police Department which it was his duty to keep and maintain in his custody. Other fingerprint cards were certified as being from the records administrator of the Idaho State Penitentiary. The exhibit, itself, reveals the official position of the records administrator and that he has legal custody of the Idaho State Penitentiary records. A proper foundation was thus laid for the admission of said exhibits and there was compliance with this Court's holding in State v. Polson, supra. I. C. § 9-315.

Appellant lastly contends that the recidivist statute presently in force in Idaho violates constitu-

tional standards against double jeopardy, ex post facto laws, cruel and unusual punishment and does not square with the requirements of due process, equal protection and privileges and immunities. Many cases of the United States Supreme Court have been decided upon these points, but discussion of two late cases will show the temper and the reasoning of that Court.

In Gryger v. Burke, Warden, 334 U.S. 728 (1948) the Court had for consideration a Pennsylvania recidivist statute similar to the statute in the case at bar. The Court said:

> "The sentence as a * * * habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Previous cases were cited as supporting that conclusion and each did in fact so hold. The Court also rejected the defendant's contention that the law was being retroactively applied and therefore offended constitutional standards against ex post facto laws.

In Spencer v. Texas, 385 U.S. 554 (1967), the Court had for consideration the validity of the Texas recidivist statute. The Court stated:

> "Such statutes [recidivist] and other enhanced-sentence laws, and procedures designed to im-

> plement their underlying policies, have been enacted in all the states, and by the federal government as well. Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities."

The judgment of the trial court is affirmed.

The record reveals that on August 29, 1969, a judgment and commitment to the penitentiary was entered by the Honorable Henry S. Martin as District Judge, wherein it is recited that the defendant, James B. Polson, is guilty of the crime of assault with a deadly weapon with intent to murder, adjudged that the said defendant be imprisoned in the Idaho State Penitentiary for a period of 14 years, and that the said defendant be delivered to the Idaho State Penitentiary and there imprisoned until legally discharged.

Following the trial had upon the remand for the crime of being a persistent violator, the District Judge, the Honorable Boyd R. Thomas, stated:

> "I note the prior order of this court, which judgment was entered on July 29, 1966., at the prior trial of this matter, that the sentence which was imposed on you upon

> the conviction at that date, assault with intent to commit murder, was increased from a period of 14 years' imprisonment by an additional term of ten years because of the determination at that time that you were a persistent violator of the law.
>
> "It would be my judgment, Mr. Polson, that you are a persistent violator of the law, and in execution of that judgment I would increase the punishment heretofore imposed by order of this court, upon the charge set forth on page 1 of the Information on file in this cause--I would increase that by the amount of ten years, and increase the sentence there imposed, such sentence to begin upon your arrival at the institution. In the meantime I would remand you to the custody of the Bonneville County Sheriff, to be by him held in custody until a demand is made for your release by a duly authorized officer of the state penitentiary, and I would authorize the Sheriff to deliver you to the custody of that office."

It is clear from the record that the trial court upon remand for the crime of a persistent violator inadvertently failed to enter a judgment and commitment to the penitentiary to effectively carry out the sentence of conviction of the court which clearly intends that the defendant, appellant herein, shall be sentenced to a term of 24 years in the Idaho State Penitentiary. For the sole purpose of correcting the record to reflect the trial court's intention in imposing sentence, the cause is remanded.

McFADDEN, C.J., McQUADE, DONALDSON and SPEAR, JJ., concur